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**ORIGINAL**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 34960**

**THE CHICAGO, LAKE SHORE AND SOUTH BEND  
RAILWAY COMPANY  
-- ACQUISITION AND OPERATION EXEMPTION --  
NORFOLK SOUTHERN RAILWAY COMPANY**



**PETITION TO REVOKE AND STAY EXEMPTION**

**MOTION FOR LEAVE TO SUPPLEMENT REPLY OF  
THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY**

**ENTERED  
Office of Proceedings**

**SEP 14 2007**

**Part of  
Public Record**

Respectfully submitted

John D. Heffner  
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(202) 296-3334

Counsel for The Chicago, Lake Shore  
& South Bend Railway Company

Dated: September 14, 2007

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

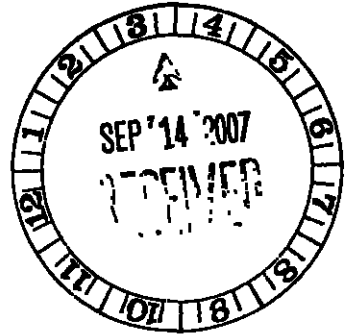
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Pursuant to 49 CFR 1104.13(a) and 1117.1, The Chicago, Lake Shore & South Bend Railway Company ("CLSSB") moves the Board for leave to supplement the reply it previously submitted on December 5, 2006, in the above-captioned exemption proceeding. There Petitioners the City of South Bend, IN, along with the Brothers of Holy Cross, Inc., and the Sisters of the Holy Cross, Inc., had filed a Petition to Revoke and Stay the Notice of Exemption jointly on November 22, 2006, asserting,, among other grounds, that CLSSB never has had and never will have an agreement with Norfolk Southern Corporation ("NS") to acquire and operate the subject rail line, and any representations by CLSSB as to the existence of an agreement constitute false and



misleading representations, that CLSSB acted in a "disingenuous and misleading" manner in resubmitting their Notice of Exemption on November 20, 2006, and that CLSSB's filing of, in its words, "misleading and untruthful Verified Notices of Exemption" constitute such an "abuse of process" by CLSSB as to warrant an award of attorney fees for time spent by Petitioners' counsel preparing responses. CLSSB has located a long misplaced letter from NS management dated September 22, 2005, copy attached, that states clearly the existence of an agreement to sell to CLSSB the line that is the subject of this proceeding, the Niles Industrial Track. The Board should deny Petitioners' request to revoke CLSSB's exemption and should authorize NS to promptly sell this line to CLSSB. Moreover, the Board should take such action as it deems appropriate for unnecessary threats by Petitioners for sanctions against CLSSB or its counsel.

As the Board will recall, this proceeding involves a highly contentious dispute involving the purchase by CLSSB of a small former Conrail branch line in South Bend, IN, now owned by NS. Initially, CLSSB had sought and the Board had granted an exemption authorizing CLSSB to acquire and operate the subject rail line by decision served July 6,

2006.<sup>1</sup> Thereafter, CLSSB withdrew that exemption and later refiled it in this proceeding on November 20, 2006. Upon receipt of Petitioners' Petition to Revoke and Stay Exemption, the Board stayed this proceeding by decision served November 22, 2006. The matter is still pending. Thereafter, Petitioners filed an Adverse Application to abandon the same NS rail line that is the subject of this proceeding. That proceeding is also still pending.<sup>2</sup>

#### ARGUMENT

CLSSB now moves the Board to accept into evidence a long missing but extremely relevant letter dated September 22, 2005, from NS' Paul L. Greene, Manager of Strategic Planning, to Robert Harris, President of CLSSB. A copy is attached. As relevant, that letter states:

"[l]et me assure you that based on our meeting of May 17 and the subsequent approval of Norfolk Southern's Tactical Line Management Team, there is an agreement to sell the Niles Industrial Track to the Chicago, Lake Shore and South Bend Railway Company LLC. Both parties have agreed to the general terms of the Transaction Summary, which outlines the major tenets of the deal structure. It was our Department's intention to have to you the closing documents by early summer and we were looking forward to closing by now. As soon as the standard contract documents are prepared, a closing date convenient to you will be scheduled."

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<sup>1</sup> Filed in The Chicago, Lake Shore and South Bend Railway Company—Acquisition and Operator Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34893.

<sup>2</sup> Docketed as Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286).

For the Board's information, Mr. Harris lives most of the year in Colorado where he is engaged in real estate development. However, he also owns a home in Porter, IN, near South Berd. He has been unable until now to locate this letter but discovered it upon cleaning up his home in Indiana. He then promptly furnished a copy to counsel. CLSSB did not submit this letter at the time it filed its original Reply on December 5, 2006, because Mr. Harris was unable to locate a copy.

CLSSB recognizes that the Board has no jurisdiction over contractual disputes. That is a matter for the courts and arbitration.<sup>3</sup> However, this letter is highly relevant insofar as Petitioners have questioned the truthfulness of CLSSB's allegations as to the existence of a sale agreement and have asserted the alleged lack thereof as a basis for revoking the exemption as void *ab initio*.


Accordingly, CLSSB moves the Board to accept into evidence NS' letter of September 22, 2005, find no basis for Petitioners' assertions that CLSSB's exemption contains false and misleading information, issue a decision granting

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<sup>3</sup> See Saginaw Bay Southern Railway Company - Acquisition and Operation Exemption - Fall Line of CSX Transportation, Inc., STB Finance Docket No. 34729, slip op. at 3, footnote 4 (STB served May 5, 2006) (Board is not proper forum to resolve private contractual disputes).

this exemption immediately, and grant such other relief as is appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

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Counsel for The Chicago, Lake Shore  
& South Bend Railway Company

Dated: September 14, 2007

# **CERTIFICATE OF SERVICE**

I, John D. Heffner, certify that a copy of the Motion For Leave To Supplement Reply of the Chicago, Lake Shore & South Bend Railway Company, was served on September 14, 2007 by hand-deliver and first-class mail to the following:

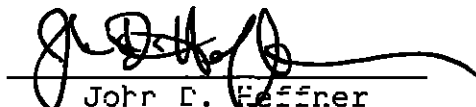
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**Paul L. Greene**  
Manager  
Strategic Planning

September 22, 2005

Mr. Robert Harris, President  
The Chicago, Lake Shore and South Bend Railway Company LLC  
404 Franklin  
Porter, IN 46304

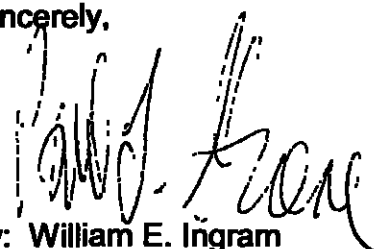
Dear Mr. Harris:

Let me assure you that based on our meeting of May 17<sup>th</sup> and the subsequent approval of Norfolk Southern's Tactical Line Management Team, there is an agreement to sell the Niles Industrial Track to The Chicago, Lake Shore and South Bend Railway Company LLC. Both parties have agreed to the general terms of the Transaction Summary, which outlines the major tenets of the deal structure. It was our Department's intention to have to you the closing documents by early summer and we were looking forward to closing by now. As soon as the standard contract documents are prepared, a closing date convenient to you will be scheduled.

The removal of the connecting switch for maintenance purposes since our initial agreement has opened up an opportunity rarely available for NS and your new railroad to jointly decide upon the best physical and economical layout for interchange operations. We are scheduling a meeting on-site with the correct personnel to review the operational and maintenance issues so that an optimum layout is produced for all parties' benefit.

We apologize for any inconveniences that our internal delays may have caused. As with any potential shortline deal, events sometimes occur that prevent us from achieving an outcome as expeditiously as we would like. Please understand that we are doing all we can to progress this project in a timely fashion.

Sincerely,

  
cy: William E. Ingram  
Greg E. Summy